IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 05-CV-329-GKF(PJC)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S MOTION IN LIMINE PERTAINING TO RULE 26(e) EXPERT "ERRATA"

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, J.D. Strong, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA ("State"), and respectfully moves this Court to enter an Order precluding Defendants from making any argument, doing any questioning or proffering any evidence regarding (1) the fact that certain expert errata were submitted by the State's retained experts, or (2) what precipitated the need for the State's retained experts to submit expert errata. In support of this Motion, the State shows the Court as follows:

I. Introduction

In May 2008, in accordance with the Court's Scheduling Order, the State served on Defendants its expert reports on all issues except damages. The State subsequently served errata for certain of its experts' reports. Defendants sought to strike the State's expert errata. *See* Dkt. #1759. On October 28, 2008, the Court in large part denied Defendants' Motion to Enforce, in pertinent part concluding as follows:

- "Rule 26(e) [of the Federal Rules of Civil Procedure] allows supplementation of expert reports only where a disclosing party learns that its information is incorrect or incomplete."

- "Rule 26(e) states, in mandatory terms, that a party must supplement or correct its disclosure or response 'in a timely manner if the party learns that in some material respect the disclosure is incomplete or incorrect.'"

- "From the court's review, it does appear the majority of the supplementations are to correct incorrect calculations."

- "Based on the court's finding that the supplements are mandatory under Rule 26(e), the court must deny [Defendants' requests to] strik[e] the errata reports or any portions thereof, require[e] prior court approval for subsequent supplements, and/or limit[] trial testimony."

See Dkt. #1787 at 3-5. Thus, the Court has accepted the State's expert errata as corrective of identified errors and as being fully compliant with Rule 26(e).

Despite the Court having found that the State's expert errata was consistent with Rule 26(e), Defendants have signaled an attempt to attach a stigma to these errata. *See, e.g.,* Dkt. #2056 at 6. This is impermissible. *See, e.g., Crowley v. Chait*, 322 F. Supp. 2d 530, 540 (S.D. Ohio 2004) ("There is no stigma attached to [expert report] error correction. If anything, it strengthens the quality of the expert report."). Neither the fact that the State served Rule 26(e) expert errata, nor the circumstances that precipitated the need for the State to serve expert errata, has any probative value. Moreover, even assuming arguendo such evidence would have probative value, such probative value would be substantially outweighed by the danger of unfair prejudice and / or confusion of the issues.

II. Legal Standard

"Evidence which is not relevant is not admissible." Fed. R. Evid. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. "Though the standard for relevance under Federal Rule of Evidence 401 is quite generous, *see United States v. Jordan*, 485 F.3d 1214, 1218 (10th

Cir. 2007), proffered evidence must, at minimum, advance the inquiry of some consequential fact to be considered relevant and admissible. *See* 7 Kenneth S. Broun, *McCormick on Evidence* § 185 (6th ed. 2006)"; *United States v. Oldbear,* 568 F.3d 814, 820 (10th Cir. 2009).

Moreover, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. "Relevant evidence may be excluded if it fails the Rule 403 analysis." *Wolfgang v. Mid-America Motorsports, Inc.*, 111 F.3d 1515, 1527 (10th Cir. 1997) (citation omitted).

III. Argument

A. Evidence and argument concerning the fact that expert errata were served and circumstances that precipitated the need for the State to serve expert errata should be precluded as irrelevant

Rule 26(e)(1) of the Federal Rules of Civil Procedure creates a "limited exception to the deadlines provided in Rule 26(a)(2)(C), [by] requiring that an expert witness supplement his report" under certain circumstances. *Minebea Co., Ltd. v. Papst,* 231 F.R.D. 3, 6 (D.D.C. 2005). Specifically, under Rule 26(e)(1), a party is under a duty to supplement "at appropriate intervals its disclosure under subdivision (a) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional and corrective information has not otherwise been made known to the other parties during the discovery process or in writing…" *See also Palmer v. Asarco Inc.*, 2007 WL 2254343, *3 (N.D. Okla. Aug. 3, 2007).

As noted above, this Court has already determined that the State's expert errata were fully compliant with Rule 26(e). *See* Dkt. #1787 at 3-5. Evidence of the fact that expert errata were submitted and the circumstances that precipitated them are simply not relevant. In the *Daubert*

context, the *Crowley* court reasoned that: "[t]here is no stigma attached to [expert report] error correction, nor should there be"; and "[i]f anything, it strengthens the quality of the expert report." 322 F. Supp. 2d at 540. Put another way, "the fact that [the expert] reviewed his original report and made certain corrections to it does not show that his methodology was unreliable -- revisions are consistent with the scientific method." *Primavera Familienstiftung v. Askin*, 130 F. Supp. 2d 450, 527 (S.D.N.Y. 2001). Similarly, as Judge Rasure of the United States Bankruptcy Court for the Northern District of Oklahoma has explained:

> The Federal Rules of Civil Procedure anticipate that an expert may have to correct or supplement her reports or amend her deposition testimony. Fed. R. Civ. P. 26(e) . . . . Unexplainable or unjustifiable revisions to reports, calculations or opinions may warrant caution in evaluating the reliability of the expert's work, but when mistakes are made, caught, corrected and *satisfactorily* explained by the expert in a supplemental report, as required by the Rule 26(e), no adverse inference as to the reliability of the expert's opinion need be drawn.

In re Commercial Financial Services, Inc., 350 B.R. 520, 557-58 (Bkrtcy. N.D. Okla. 2005) (emphasis in original).

Clearly, the fact that expert errata were served, as well as the reasons precipitating their service, is of minimal -- if any -- probative value in the *Daubert* context. It necessarily follows that the fact that expert errata were submitted would have **no** probative value during trial on the merits. In short, the evidence and / or argument regarding the fact that expert errata were submitted here would not "advance the inquiry of some consequential fact." *See Oldbear*, 568 F.3d at 820. Therefore, such evidence and / or argument should be precluded.

B. Even if relevant, evidence and argument concerning the fact that expert errata were served and circumstances that precipitated the need for the State to serve expert errata should be precluded as their probative value is substantially outweighed by the danger of unfair prejudice and confusion of the issues

Any arguable probative value of evidence or argument regarding the fact that expert errata were served or the circumstances that precipitated the need for the service of the errata is miniscule. At trial, Defendants would only be using the errata for some impeachment-type purpose. Defendants would likely present such evidence or argument to create a "stigma" in the fact finder's mind about the expert and his opinions. Again, it is not proper to use the expert errata for such a purpose. *See, e.g., Crowley,* 322 F.Supp.2d at 540. Evidence and argument concerning the submission of expert errata tells one exactly nothing about the relevant liability issues in this case while unfairly stigmatizing the State's experts for prudently correcting identified errors and complying with the Federal Rules. The potential for confusion of the issues is apparent. The focus should be on the *current* data and calculations as corrected by the experts. In sum, even if relevant, evidence and argument concerning the submission of expert errata fails Rule 403 analysis and should be precluded. *See Wolfgang,* 111 F.3d at 1527.

WHEREFORE, premises considered, the State respectfully requests that the Court grant this Motion in Limine and enter an Order precluding Defendants from making any argument, doing any questioning or proffering any evidence regarding the fact that certain expert "errata" were served by the State in compliance with Rule 26(e) of the Federal Rules of Civil Procedure, or the circumstances that precipitated the need for the service of such errata.

Respectfully submitted,

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I certify that on the 5th day of August, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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